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Supreme Court

No. 98-137

JUL 20 1998

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In The

Supreme Court of the United States

October Term, 1997

ERICA RESNER and MARY LOU RESNER,

Petitioners,

vs.

ARC MILLS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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39 pp.

QUESTIONS PRESENTED FOR REVIEW

Petitioner MARY LOU RESNER worked in the credit department of the defendant-respondent ARC MILLS INC. The credit department consisted of Mary Lou, a second employee plus a supervisor. Petitioner ERICA RESNER is Mary Lou's daughter. Erica was rendered a quadriplegic as a result of a car accident. Arc provided medical insurance coverage for its employees and their dependents. As a result of Erica's accident, Arc's expenses for medical insurance coverage increased. Mary Lou was fired by Arc. Arc's medical insurance rates decreased. The trial court found that employee dismissals was a legitimate cost cutting activity.

Where one of two employees could have been dismissed, did the trial court err in failing to determine or even consider that petitioner MARY LOU RESNER, the more qualified, lower paid employee, was unlawfully (under ERISA) chosen for dismissal by respondent ARC MILLS INC. largely because Mary Lou's daughter, petitioner ERICA RESNER, was involved in a car accident which rendered her a quadriplegic and caused respondent to incur increased medical insurance premiums for Arc's employees and their dependents?

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Opinion of the United States Court of Appeals for the Second Circuit is not published but is annexed hereto as Appendix "A". The opinion of the district court is also not published and appears as Appendix "B".

STATEMENT OF JURISDICTION

The order of the Second Circuit Court of Appeals was entered on April 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant part of §510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1140 is reproduced as follows:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

STATEMENT OF THE CASE

A bench trial in regard to liability was conducted in the trial court. The issues of liability and damages were bifurcated. The facts adduced at trial show that petitioner Mary Lou Resner ("Mary Lou", hereafter) is the mother of petitioner Erica Resner, ("Erica", hereafter). Mary Lou was employed by respondent Arc Mills, Inc. ("Arc", hereafter) in their credit department with another employee Lazlo Herczfeld ("Herczfeld", hereafter), both of whom operated under the auspices of a manager, Walter Kreitch.

Erica was in a horrible car accident which rendered her a quadriplegic for life. Arc provided medical insurance benefits to its employees and their dependents. Arc consistently took steps to trim medical insurance costs. The Court will recall that in 1993, the time when the events in question took place, the Clinton administration had just come to power and there was much discussion about medical insurance coverage. In fact the President's wife headed a commission dealing with this very issue and there was much nation-wide discussion about it. Arc, like others at that time, was made to feel alarmed that medical insurance rates would skyrocket. As a result, Arc made it a practice to shop for better rates and moved from carrier to carrier to carrier.

After Erica's accident, Arc again tried to switch carriers. Arc applied to a well-known low-cost carrier but their application was summarily rejected specifically due to Erica's condition. Mary Lou was then fired, purportedly for reasons of cost-cutting. By

firing Mary Lou Arc saved the amount of her salary, about $30,000.00, plus medical insurance premiums of about $90,000.00 per year.

Mary Lou worked for Arc in their credit department since 1991. She introduced the company to the benefits of assigning their receivables to *factors* and earned the company many millions as a result. (*Factoring* is a procedure whereby a manufacturer sells merchandise to a customer. The manufacturer gets paid by the factor, and the customer's receivable is assigned to the factor who collects from the customer. This custom allows a manufacturer to concentrate on manufacturing instead of debt collection.) Herczfeld was hired around June, 1993. He had no prior experience with factoring. He was paid a greater wage than Mary Lou. Mary Lou was fired on October 1, 1993 and her duties were assigned to Herczfeld.

At the time that Mary Lou was fired Herczfeld was suspected of petty thievery. Shortly after Mary Lou was fired Herczfeld was fired for dishonesty. In particular, he entered into a transaction where he extended credit to a personal friend who would not otherwise have qualified for an extension of credit. The trial court in its Findings of Facts characterized Herczfeld as "untrustworthy". In any event, Arc chose this man to succeed Mary Lou. The duties previously performed by Mary Lou and Herczfeld are now performed by two other individuals. Mary Lou was never made an offer of reinstatement, even after Herczfeld was let go.

Arc had two principals, its president and its vice-president plus about 55 other employees. At the same time that Arc was professing a desire to cut costs they raised the salary of its president from about $2.6 million to about $3.1 million and

raised its vice-president from about $1.9 million to about $2.7 million. Arc spent around a quarter million dollars on office renovation and decoration plus added the son of one of the principals to Arc's payroll for a salary of about $120,000.00, which coincidentally is the approximate amount of money that Arc saved by firing Mary Lou. At trial, petitioners expressed serious doubts that cost cutting of the kind professed by the defendant was the real motivating factor behind Mary Lou's firing.

Petitioners instituted this suit under §510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1140, claiming that Mary Lou was unlawfully discharged for the purpose of interfering and depriving Mary Lou and Erica from medical coverage to which they were entitled. Respondent argued that Mary Lou's firing was nothing more than legitimate downsizing. Respondent never defended their decision to fire Mary Lou over Herczfeld. The trial court found that Mary Lou's dismissal was part of legitimate downsizing. Given that finding, the trial court never took the next step to rule on whether unlawful discriminatory concerns were taken into account by Arc in choosing to fire Mary Lou over Herczfeld. The Court of Appeals, in essence, rubber-stamped the trial court's decision stating that it did not want to disturb the factual finding of the court below and they also failed to consider why Mary Lou was fired over Herczfeld.

REASON OR REASONS FOR GRANTING THE WRIT

This is a case where, figuratively speaking, the courts below failed to see the forest for the trees. The trial court got so caught up in finding that "Arc's decision to reduce its work force by eliminating redundant or less critical positions to be a legitimate, nondiscriminatory reason underlying Ms. Resner's termination" that, thereafter, it failed to see that, Arc undoubtedly utilized unlawful criteria in exercising its choice in deciding who to fire. Given the choice of two people to fire, Arc fired Mary Lou instead of the less qualified, less experienced, higher paid and less trustworthy Herczfeld.

While petitioners have their doubts about Arc's downsizing as legitimate and not pretextual, assuming that their stated motive is legitimate as the trial court found, the courts below erred in failing to see that the medical coverage situation motivated Arc to choose Mary Lou for dismissal instead of the less desirable Herczfeld. Barring an unlawful discriminatory reason for firing Mary Lou, logic dictates that if someone had to be let go it should have been Herczfeld.

The courts have recognized that there is rarely direct evidence of discrimination because its practitioners try to hide it. Employers who act contrary to law do not note such motives in their records and in most employment discrimination cases direct evidence of the employer's discriminatory motivation is unavailable. As such, the guidelines set forth in McDonnell Douglas v. Green, 411 U.S. 792 are to be applied. Dister v. Continental Group, 859 F.2d 1108 (2d Cir. 1988).

First the plaintiffs have the burden of proving by a preponderance of the evidence the existence of a prima facie case of discrimination. Second, if plaintiff succeeds in proving its prima facie case by a preponderance of the evidence the employer must then articulate some legitimate, nondiscriminatory reason for discharging the employee. Lastly, if the defendant/employer meets its burden then the plaintiff must prove by a preponderance of the evidence that the reasons proffered by the defendant were not its true reasons and were pretextual.

Assuming that Arc was legitimately engaged in downsizing, there is a strong inference in this case that Arc took into consideration Mary Lou's situation in regard to its effect on their health insurance premiums and were motivated to fire Mary Lou instead of Herczfeld. Given the choice of firing Mary Lou or Herczfeld, a sensible person would certainly have terminated Herczfeld over Mary Lou. Mary Lou practically founded the department. She was experienced, capable and competent. Her honesty and integrity were never called into question. Herczfeld, on the other hand, was recently hired, less experienced, less capable and less competent. He was paid more money and was ultimately fired for dishonesty. Even the trial court characterized Herczfeld as "untrustworthy".

A desire to engage in cost cutting, the pretextual reason for Mary Lou's firing, is wholly inconsistent with the defendant's other concurrent activities. At or about the same time that Mary Lou was let go Arc's two principals gave themselves salary increases of $800,000.00 and $500,000.00, respectively. Arc spent around a quarter-million-dollars on office renovation and decoration. The son of one of the principals was added to Arc's

payroll for a salary of about $120,000.00, which is approximately the same amount of money that Arc saved by firing Mary Lou.

Plaintiffs have a very low threshold in establishing a prima facie case under ERISA. DeVoll v. Burdick Painting, Inc., 35 F.3d 408 (9th Cir. 1994) citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)..

The "preponderance of the evidence" standard applies in cases under the ERISA statutes. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

It is inconceivable that the petitioners' predicament was not given one iota of consideration by Arc in their decision making process. If, however, Mary Lou's dismissal was in any way influenced by the desire to strip her of medical coverage then the petitioners must prevail on their ERISA claims.

The fact is that Arc admitted that their concern was cost-cutting. Firing Mary Lou accomplished their cost-cutting purpose on two levels - Arc saved themselves the expense of Mary Lou's salary and, even more important to Arc, they cut their recurring medical insurance expense dramatically with their prevailing carrier and made themselves eligible for coverage with other less expensive carriers who previously would never have provided coverage due to the burden of caring for Erica. Firing Herczfeld would not have yielded the same savings as firing Mary Lou. Arc never proffered any reason whatsoever for firing Mary Lou over Herczfeld.

The petitioners have clearly met their burden of showing by a preponderance of the evidence that Mary Lou was unlawfully fired to deprive her of medical insurance benefits.

In regard to the employer's burden, in our case, the employer never even tried to meet the challenge of satisfying its

obligation to come forward and show a legitimate, non-discriminatory reason for firing Mary Lou instead of Herczfeld. All they did was argue that they were engaged in legitimate cost cutting activities.

Since the employer failed to meet its obligation under the McDonnell Douglas guidelines there is nothing to rebut and the petitioners need not prove by a preponderance of the evidence that the reasons proffered by the defendant were not its true reasons and were pretextual. However, had Arc met its McDonnell Douglas obligation, petitioners adequately met their additional burden by having demonstrated that Mary Lou was clearly the superior, more desirable employee but for the medical insurance problem. Furthermore, when one takes into consideration that she was being paid less than Herczfeld firing Mary Lou while retaining Herczfeld appears to be an act of insanity, unless there was some other factor at play. It is the petitioners' position that this is exactly what happened here. Arc's principals are not insane. They knew that firing Mary Lou would save them $120,000.00 in the first year alone so she was fired. Firing Mary Lou for the purpose of depriving her of an employee of a benefit is a clear violation of 29 U.S.C. §1140. In deciding who to fire, Mary Lou or Herczfeld, had Arc flipped a coin or pulled a name out of a hat the firing would not have been actionable or unlawful. In the instant matter, by firing Mary Lou instead of Herczfeld it is obvious that genuine business interests of job performance, honesty, experience and a lower salary were outweighed by Arc's interest in stripping the petitioners of their medical benefits, which is patently unlawful.

The district court should have gone beyond its finding that cost-cutting is a legitimate motive and should have considered and concluded that Mary Lou was chosen for dismissal solely

because of her medical insurance situation. That her medical insurance predicament was taken into consideration as a motivating factor for her firing is a violation of law. Petitioners seek a remand for the assessment of damages.

CONCLUSION

For the reasons stated herein, it is respectfully requested that this Honorable Court grant the instant Petition and permit the petitioners to appeal to this Honorable Court.

Dated: New York, N.Y.
July 15, 1998

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22d day of, April, one thousand nine hundred and ninety-eight.

PRESENT: Hon. John M. Walker, Jr.,
Hon. Pierre N. Leval,

Circuit Judges,

Hon. Charles L. Brieant,*
District Judge.

SEAL
United States Court of Appeals 2d Cir
Filed 4/22/98
Geo. Lange III
Clerk

Erica Resner and Mary Lou Resner,

Plaintiffs-Appellants,

v.

No. 97-7981

Arc Mills, Inc.,

Defendant-Appellee.

APPEARING FOR APPELLANTS: Robert B. Anesi, Esq., (Anesi & Stern LLP), New York, N.Y.

APPEARING FOR APPELLEE: Harris N. Cogan, Esq., (Tenzer Greenblatt LLP), New York, N.Y.

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* The Honorable Charles L. Brieant of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Preska, J.), and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the appeal from said district court be and it hereby is AFFIRMED.

Appellants Erica and Mary Lou Resner (collectively the "Resners") appeal from the July 28, 1997, judgment of the district court, following a two-day bench trial, finding in favor of defendant, Arc Mills Corp. ("Arc Mills"), and dismissing the Resners' complaint alleging that the termination of Mary Lou's employment with Arc Mills violated Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. Mary Lou was employed in the credit department of Arc Mills as of June 1991, where she received medical insurance as part of her employee benefits. In 1992, Erica, Mary Lou's dependent daughter, was involved in an automobile accident in which she suffered severe spinal injuries that left her a permanently disabled quadriplegic. The first $250,000 of medical expenses for Erica's continuing treatment were covered by New Jersey's no-fault insurance provisions. Thereafter, these bills were paid by Arc Mills' insurance carrier, Chubb Life America ("Chubb"). In October 1993, Mary Lou was informed by one of Arc Mills' principals that her position was being eliminated as part of a cost-saving reduction in force.

The Resners brought this suit alleging that Mary Lou was terminated in order to eliminate her and Erica from Arc Mills' health insurance plan, in violation of § 510 of ERISA, which provides, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

In order to prevail on an ERISA claim, the plaintiff must establish that the employer was motivated at least in part by the specific intent to engage in activity prohibited by § 510. See Dister v. Continental Group, Inc., 859 F.2d 1108, 1112 (2d Cir. 1988); Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir. 1987). As the district court noted, claims brought under § 510 are analyzed using the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973). Under this framework, the plaintiff must first establish a prima facie case of discrimination by demonstrating (1) that the plaintiff was a member of the protected class; (2) that plaintiff was qualified for the job she was performing; (3) that she was discharged; and (4) that the discharge occurred under circumstances giving rise to an inference of discrimination. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). If the plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to "'articulate some legitimate, nondiscriminatory

reason for the employee's [termination].'" Id. (quoting McDonnell Douglas, 411 U.S. at 802). Should the defendant carry this burden of production, the plaintiff must then prove by a preponderance of the evidence that the legitimate, nondiscriminatory reasons offered by the defendant were not its true reasons, but in fact a pretext for discrimination. See id. At all times, the plaintiff bears the ultimate burden of demonstrating that the real motivation underlying the employer's actions was unlawful discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 517-18 (1993).

In ruling for Arc Mills, the district court held that the Resners' had failed to establish that Mary Lou's termination occurred under circumstances giving rise to an inference of discrimination and, therefore, they did not establish a prima facie case. The district court went on to state that even if the Resners had established a prima facie case, they failed to prove by a preponderance of the evidence that the legitimate nondiscriminatory reasons proffered by Arc Mills were in fact a pretext for discrimination.

On appeal, the Resners do not challenge the district court's recitation of the applicable legal standards. Rather, they argue that the district court erred in its factual determination that they had failed to meet their burden of proving discrimination. Pursuant to Fed. R. Civ. P. 52(a), we will not set aside the district court's factual findings unless they are "clearly erroneous," giving due deference to the district court's credibility assessments. See Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); Cornwell v. Robinson, 23 F.3d 694, 706 (2d Cir. 1994). A finding is clearly erroneous only if "the reviewing court on the entire evidence is left with the definite

and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

According to the evidence adduced at trial, Chubb covered 100% of Erica's medical claims that exceeded an initial $5000 deductible, and there was no evidence that Arc Mills was aware of the specific amounts of Erica's medical claims prior to Mary Lou's termination. The district court found, however, that "[c]ommon sense dictates [] that Arc [Mills] must have been aware that the costs of caring for a quadriplegic are extensive." Although Chubb raised its insurance premiums shortly after it began paying Erica's medical claims, a subsequent letter from Chubb stated that "Mary Lou Resner and her dependents had little or no impact on the rate increase." Furthermore, much of the premium increases were passed directly from Arc Mills onto its employees.

After Erica's accident, Arc Mills provided significant assistance to the Resners by requesting that Chubb provide a live-in health aide on an "extra-contractual basis" and by making an interest-free loan to the Resners so that they could purchase a specially equipped van. Arc Mills also voluntarily continued to pay Mary Lou's insurance premiums for nine months following her termination and attempted to provide her with the choice of staying with Chubb when Arc Mills switched insurance carriers a year after Mary Lou's termination.

Three other employees were terminated at the same time as Mary Lou; only one of these positions (not Mary Lou's) had since been reinstated. Arc Mills' stated reason for the terminations was that it wanted to reduce overhead to hedge against an anticipated downturn in the garment industry. Such a downturn did in fact take place the following year. The

Resners argue that they sufficiently discredited this reason by showing that the minimal savings obtained by eliminating these four positions were outweighed by the company's large concurrent expenditures in renovating its office space, hiring the son of an Arc Mills principal as general counsel, hefty year-end salary increases given to both principals, and bonuses paid to all of the employees . The district court found that this evidence, at best, merely established poor business judgment and was insufficient to prove that Arc Mills' stated reasons were a pretext for discrimination, citing Dister, 859 F.2d at 1116 ("Evidence that an employer made a poor business judgment in discharging an employee generally is insufficient to establish a genuine issue of fact as to the credibility of the employer's reasons."). Finally, the only direct evidence of discrimination was presented by a witness who the district court held was not credible. We defer to the district court's credibility assessment. See Fed. R. R. Civ. P. 52(a); Cornwell, 23 F.3d at 706.

The plaintiffs do not point to any evidence that was overlooked by the district court, they merely argue that the district court came to the wrong conclusion after reviewing the evidence. It is well established that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Id. at 706 (quoting Anderson v. Bessemer City, 470 U.S. 564, 574 (1985)). In reviewing the record as a whole, we find that the district court's determination that plaintiffs had failed to meet their burden of proving that Arc Mills' termination of Mary Lou was the result of unlawful discrimination was not clearly erroneous.

Accordingly, the judgment of the district court is AFFIRMED.

FOR THE COURT: ,

/s/ Lucille Carr

GEORGE LANGE III,
Clerk by: Lucille Carr,
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERICA RESNER and MARY LOU RESNER,

Plaintiffs,

95 Civ. 2924 (LAP)

-against-

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ARC MILLS, INC.,

Defendant.

LORETTA A. PRESKA, United States District Judge:

This is an action alleging a violation of Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140 (1997). Plaintiff Mary Lou Resner alleges that defendant Arc Mills Corp. ("Arc") terminated her employment on October 1, 1993 in order to remove her disabled daughter, Erica, from Arc's group health insurance plan. The case was tried to the bench on May 5 and 6, 1997, and at the conclusion of trial I reserved decision. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, I now issue the following findings of fact and conclusions of law in support of my decision in favor of defendant.

FINDINGS OF FACT

1. Arc is engaged in the textile industry in New York City. In June, 1991, Mary Lou Resner was hired to work in the

credit department at Arc. (Tr., p.59). Ms. Resner's responsibilities included, among other things, preparing a monthly report of the payments and charge backs on Arc's factored accounts receivable. (Tr., p. 60).

2. When Mary Lou Resner joined Arc, the credit department contained only two employees, herself and Walter Kreitch. In June, 1993, Arc hired a third employee for the department, Lazlo Herczfeld, who assisted Ms. Resner with at least one of the factored accounts and also worked on general collections. (Tr., pp. 19, 77). Prior to that time, Ms. Resner had complained to Arc management that she needed assistance, and some of her work was shifted to another employee in the Administrative Department. (Tr., pp. 90-93). Even after Herczfeld was hired, Ms. Resner continued to advise Arc management that she required further assistance. (Tr., pp. 92-94).

3. On April 11, 1992, Ms. Resner's daughter Erica was in a serious car accident. (Tr., p. 65). The accident left Erica a permanently disabled quadriplegic. Erica spent until June 8, 1992 in St. Vincent's Hospital; from June, 1992 until September, 1992, Erica was at the Robert Wood Johnson rehabilitation facility in Edison, New Jersey. In September, 1992, Erica was transferred to Manorcare Rehabilitation in Mountainside, New Jersey, where she remained until April, 1993, when she came home to live with her mother. (Tr., p. 66).

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1. References to "Tr. _____" refer to the transcript of the bench trial in the within matter conducted on May 5 and May 6, 1997.

4. Erica was covered as a dependent of her mother under the insurance policy applicable to Arc Mills employees. At the time of her accident, Arc's insurance carrier was Chubb. (Tr., p. 67).

5. The costs of Erica's care were initially covered pursuant to a no-fault automobile insurance policy. Once the limits of that policy had been reached, coverage under the Chubb policy was triggered. (Tr., p. 105).

6. The Chubb policy provided that Arc would pay the first $5,000 of each employee's claim out of a fund in which Arc was required to maintain a balance of approximately $29,000. (Tr., p. 254-55). At the end of each month, Arc would receive a statement from Chubb advising it of the deposit needed to bring the fund back to the required level. (Tr., p. 255). The claims of Arc employees that were above the $5,000 threshold were 100% covered by Chubb. Arc never received any statement as to how much reimbursement Chubb was paying for a particular employee's claims once the $5,000 mark had been passed. (Tr., p. 255). Arc was therefore never aware of the total amount paid on behalf of Mary Lou and Erica Resner. (Tr., p. 256). Common sense dictates, however, that Arc must have been aware that the costs of caring for a quadriplegic are extensive.

7. On October 1, 1993, Arc terminated the employment of four individuals, including Mary Lou Resner. (Tr., p. 160). According to the co-owner and vice president, Andrew Klein, the principals of Arc were concerned that the textile industry as a whole and Arc in particular would experience a downturn in 1994, despite having a banner year in 1993. Arc therefore decided to reduce overhead by eliminating

certain positions, including Ms. Resner's. (Tr., p.162). The total annual salaries of the discharged employees amounted to approximately $87,000.00. (Tr., p. 206; Plaintiffs' Exhibit 8). Ms. Resner agreed that Arc may have had legitimate business reasons for terminating the other three employees who were discharged on October 1, 1993. (Tr., p. 107) .

8. Arc did experience a reduction in sales and gross profits between 1993 and 1994. (Tr., p. 162).

9. In 1993, both Robert Bender and Andrew Klein (Arc's owners) received substantial increases in personal compensation. During the same year, Arc undertook an extensive renovation of its offices. (Tr., pp. 214-18). In July, 1993, Arc hired Howard Bender as Vice President and in-house counsel at an annual compensation rate of approximately $130,000. (Tr., p. 283; Defendant's Exh. H). Arc employees received a general bonus at the end of 1993, as well as the end of 1994. (Tr., p. 220).

10. Mr. Klein determined that the credit department was overstaffed. He selected Mary Lou Resner as the "most expendable" employee in the department, although he believed her work had been generally satisfactory, because Ms. Resner continued to claim that she needed assistance in dealing with the growing volume of factored accounts, while Mr. Herczfeld assured him that he was eager to take on Ms. Resner's work in addition to his own. (Tr., p. 163).

11. Since October 1, 1993, three out of the four eliminated positions have not been restored. None of the four affected departments has increased its staff, and the credit department has further reduced its staff by one member. (Tr., pp. 164-65).

12. Mary Lou Resner testified that Arc was "very kind" and fully cooperative in helping her obtain all insurance benefits. (Tr., p.99). No one at Arc ever made any inappropriate comments to her concerning her daughter's disability or insurance costs. (Tr., p. 99). In fact, in January, 1993, when the rehabilitation center was contemplating releasing Erica Resner to live at home, Mary Lou Resner asked Arc to assist her in obtaining a live-in home health aide pursuant to the Chubb policy. Arc placed Ms. Resner in direct contact with Jim Lardiere, its insurance broker; when Chubb denied the request for a live-in aide, Andrew Klein wrote to Chubb on January 22, 1993, requesting that a live-in home health aide be provided to Ms. Resner on "an extra-contractual basis." (Tr., pp. 98-101; 168-69).

13. On or about February 4, 1993, Arc made Ms. Resner a $6,000 interest free loan, repayable within 90 days, to assist her in obtaining a specially-equipped van for her daughter. (Defendant's Trial Exh. D).

14. When Mary Lou Resner's employment was terminated, she was entitled to continue her family's coverage under Arc's insurance policy for 29 months, pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). (Tr., pp. 272-73). Although not obligated to do so, Arc agreed to pay the costs of the Resners' COBRA

coverage through December 31, 1993. Arc continued to make payments on the Resners' behalf through May, 1994. (Tr., p. 167).

15. Erica Resner continued on Arc's health plan through December 1994. By letter dated December 29, 1994, Chubb notified Arc that, under COBRA, Erica was no longer entitled to coverage because she had become eligible for Medicare benefits upon reaching her twenty-first birthday. (Tr., p. 253). Prior to that date, no one at Arc was aware that Erica was eligible for Medicare or of the impact of Erica's Medicare eligibility on her entitlement to COBRA coverage. (Tr., p. 281, 288).

16. Even after Chubb denied coverage, Arc made efforts to see if the Resners could obtain coverage under Arc's new carrier, Aetna Life Insurance Company ("Aetna"), or whether she could obtain continued coverage under Chubb. (Tr., pp. 134-37).

17. During the relevant periods of time, Arc employed a variety of insurance carriers. Arc's first change was from Blue Cross of New York to Chubb and took place in March, 1992, after Mary Lou Resner's employment commenced but before Erica Resner's accident. At the time of Ms. Resner's termination on October l, 1993, Arc was not specifically contemplating a further switch in carriers. (Tr., pp. 178, 250-51).

18. Arc applied for health insurance from Oxford Insurance Company in June of 1994 (some time after Mary Lou Resner was terminated) and was rejected. (Tr., p. 273). Richard Kolson, Arc's controller, testified that his understanding was that Oxford rejected Arc due to the size of Erica's treatment costs, which Arc's carrier would be obliged to cover under

COBRA. (Tr., p. 275). Mr. Kolson sent a memo to Arc's employees that euphemistically attributed the denial to "contractual obligations," in order to protect the Resners' privacy. (Id.).

19. Arc investigated other carriers in Spring, 1994 and ultimately switched from Chubb to Aetna in the fall of 1994, effective January l, 1995. When Arc applied for coverage with Aetna, it included plaintiffs as covered individuals, as well as sending Aetna claim forms to plaintiffs. Arc notified its plan participants -- including plaintiffs -- that it would be switching to Aetna as its health insurer prior to Arc's receiving notice of Erica Resner's ineligibility for COBRA coverage because of her Medicare eligibility.

20. Plaintiffs' reliance on correspondence between James Lardiere, Arc's insurance broker, and Chubb to support their allegations of discrimination is misplaced. Howard Bender convincingly explained that the purpose of the correspondence was to explore whether Ms. Resner could exercise an "extension of benefits" option to continue coverage with Chubb, for which she had expressed a preference. (Tr., pp. 289-92).

21. According to Chubb's and Aetna's own documentation, Erica Resner's medical condition was not a factor in determining the premiums charged to Arc. (Deft's Trial Exhs. F and G; Tr., pp. 286-87). Arc understood that its premium was based upon a general community rating rather than the actual claims experience of its employees. (Tr., p. 252).

22. Arc received notice of an increase in premiums from Chubb in July, 1993. The increase for employees was 35%, for spouses was 19% and for dependents was 16%. Thus, although Arc's premiums increased following Erica's accident,

the category into which her coverage fell experienced the smallest increase. (Tr., pp. 258-59). Additionally, the increase in premiums for dependent coverage, which amounted to approximately $17.00 per month, was passed on to the company's employees in its entirety, because prior to Ms. Resner's termination, Arc had decided that it would charge its employees for the full cost of spouse and dependent coverage, while continuing to pay the full cost of employee coverage. Arc made this decision based on Andrew Klein's impression that Arc's policy was excessively generous in comparison to the prevailing custom in the textile industry and that it encouraged employees to waste the company's resources by obtaining duplicative coverage for spouses and dependents. (Tr., PP. 174-78).

23. Plaintiffs' only evidence in support of an inference of discrimination came in through the testimony of Lazlo Herczfeld. Mr. Herczfeld, who mysteriously materialized in time to testify for trial after speaking with plaintiffs' lawyer for the first time on the eve of trial, claimed that shortly after he began working for Arc, Richard Kolson, Arc's controller, told him that Arc was having a difficult time finding a new insurance carrier because of Erica Resner's medical condition. (Tr., pp. 20-24). Mr. Kolson denied ever having such a conversation. (Tr., pp. 260-61). Mr. Herczfeld further testified that he was present at two or three additional conversations involving Arc's general counsel, Arc's vice president and/or its controller in which they discussed terminating Mary Lou Resner because of her daughter's medical costs. (Tr., pp. 25-27, 28, 30). Howard Bender, Andrew Klein, and Richard Kolson unanimously asserted that no such conversation took place. (Tr., pp. 164;

231-32; 260-61; 297). Mr. Herczfeld also testified that Arc distributed a memo to all employees in the summer of 1993, advising that Arc was contemplating switching health insurance carriers. On this issue, Mr. Herzcfeld is contradicted by Mary Lou Resner herself, who indicated that she never received such a memo during the summer of 1993. (Tr., p. 96).

24. I find Mr. Herzcfeld's testimony to be incredible and inherently untrustworthy. On every material point, his evidence was contradicted by that of some other witness. Moreover, Arc terminated Mr. Herczfeld in December, 1994, due to its belief that he had improperly extended credit to a friend in the textile business who was not creditworthy. In response, Mr. Herzcfeld sent a threatening letter to Mr. Klein, warning him to "keep an eye on [his] back" and that Herczfeld was planning to "do some whistleblowing" on Arc. (Tr., pp. 48-49). Mary Lou Resner testified that she believed that she had caught Mr. Herzcfeld engaging in petty thievery while at Arc and that she did not trust him. (Tr., p. 95). Further, I find it highly unlikely that Arc's officers would engage in sensitive discussions about their discriminatory intent with or in the presence of a low-level employee who had only recently joined the company.

CONCLUSION OF LAW

25. Section 510 of ERISA provides, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which

> such participant may become entitled under [an employee benefit plan.]

28 U.S.C. § 1140 (1982). Section 510 was designed primarily to prevent "unscrupulous employers from discharging or harassing their employees" in order to keep them from exercising their rights under an employee benefit plan. West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980). An essential element of plaintiff's proof under the statute is to show that the employer was at least in part motivated by the specific intent to engage in activity prohibited by § 510. Gavalik v. Continental Can Co., 812 F.2d 834, 853 (3d Cir.), cert. denied, 484 U.S. 979 (1987); Titsch v. Reliance Group, Inc., 548 F. Supp. 983, 985 (S.D.N.Y. 1982), aff'd mem., 742 F.2d 1441 (2d Cir. 1983). "No ERISA cause of action lies where the loss of [employee benefits] was a mere consequence of, but not a motivating factor behind, a termination of employment." Titsch, 548 F. Supp. at 985; see also Gavalik, 812 F.2d at 851 ("Proof of incidental loss of benefits as a result of termination will not constitute a violation of § 510.").

26. In analyzing claims brought under Section 510, the Second Circuit has held that the three-step analysis set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) applies. Dister v. Continental Group, Inc., 859 F.2d 1108, 1112 (2d Cir. 1988) ("We hold that the McDonnell Douglas presumptions and shifting burdens of production are equally appropriate in the context of discriminatory discharge cases under § 510 of ERISA."). The McDonnell Douglas framework provides:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection. . . ." Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (quoting McDonnell Douglas, 411 U.S. at 802, 804).

27. Proof of a prima facie case creates a presumption that the employer unlawfully discriminated against the employee. Dister, 859 F.2d at 1112. The employer must then rebut this presumption by producing evidence of legitimate, nondiscriminatory reasons underlying its conduct; the employer, however, "need not persuade the court that it was actually motivated by the proffered reasons" at this stage of the case. Id. (quoting Burdine, 450 U.S. at 256); see also Board of Trustees of Keane State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978). If the employer is successful, the presumption of discrimination drops out of the case. Dister, 859 F.2d at 1112.

28. The plaintiff's ultimate burden of persuading the trier of fact that he or she was the victim of intentional discrimination then merges with the plaintiff's burden of proving that the employer's proffered explanation is pretextual. Burdine, 450 U.S. at 256. This may be accomplished "either directly by

persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. The burden remains at all times with plaintiff, however, to demonstrate that the real motivation underlying the employer's conduct is unlawful discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514 (1993); see also Fisher v. Vassar College, 70 F.3d 1420, 1437 (2d Cir. 1995), aff'd on reh'g en banc, 1997 WL 310467 (2d Cir. 1997);' Salpaugh v. Monroe Community Hosp., 4 F.3d 134, 142 (2d Cir. 1993), cert. denied, 510 U.S. 1189 (1994).

29. To establish a prima facie case, the plaintiffs must demonstrate: (1) that the Resners are members of the protected class; (2) that Ms. Resner was qualified for the job she was performing; (3) that she was discharged (4) under circumstances giving rise to an inference of discrimination. Burdine, 450 U.S. at 253. In the present case, no dispute exists as to the first three elements. Both Mary Lou Resner and Erica Resner were plan participants and therefore members of the protected class under ERISA. The defendant does not dispute that Ms. Resner was qualified for her position and that she was discharged. The parties' disagreement centers around whether the plaintiffs have satisfied the final element of their prima facie case.

30. Plaintiffs allege that the circumstances surrounding Ms. Resner's termination raise a strong inference of discrimination. They point to the relatively low total salaries of the terminated individuals, taken in conjunction with other expenses undertaken by Arc during the same time period, as evidence that Arc was not genuinely interested in saving costs in anticipation of a downturn in business in 1994. Ms. Resner

also asserts that her specific position was of unique importance to the company's economic well-being because she was involved in maximizing Arc's collection of revenues. Even Ms. Resner agrees that Arc had a legitimate reason for terminating the other three employees terminated on October 1, 1993, but she contends that she was not in an equally "low-level clerical" position.

31. Defendant, on the other hand, points out that Ms. Resner's position was never replaced and that other employees within Arc were easily able to absorb her work. Arc also relies on the negative inferences available to be drawn from the fact that Erica Resner's accident took place a full eighteen months prior to Ms. Resner's discharge and that any increase in premiums for dependent care were fully passed on the employees. In assessing the circumstances of a Section 510 case, courts look at both the timing and the cost savings to the defendant of the allegedly discriminatory discharge. Dister, 859 F.2d at 1114-15; Novak v. TRW Inc., 822 F. Supp. 963, 968 (E.D.N.Y. 1993) (addressing a termination that was simultaneous with appeals for approximately $250,000 of medical benefits); Lawford v. New York Line Ins. Co., 739 F. Supp. 906, 913 (S.D N.Y. 1990) (plaintiff was terminated seven months prior to assumed vesting period for pension benefits); Kelly v. Chase Manhattan Bank, 717 F. Supp. 227, 232 (S.D.N.Y. 1989) ("[T]he timing of the discharge and the resulting savings to the employer raised an inference of discrimination."). Defendant contends that these facts preclude any inference of discrimination.

32. Moreover, the mere fact that Erica had substantial medical bills is not sufficient in itself to "provide some basis for

believing that the prohibited intent was present." Kapetanovich v. Rockwell Intern. Inc., 1994 WL 530912, at *2 (3d Cir. 1992) (upholding a grant of summary judgment in favor of defendant because plaintiff failed to establish a prima facie case). In Kapetanovich, the court noted that plaintiff had "produced no evidence that anyone at [his employer] was even aware of the size of his medical bills." Id. at *3. The court additionally noted that the plaintiff's medical claims were submitted directly to the insurance company, which did not provide the employer with claim information on an employee-by employee or even on a department-by-department basis. Id. Similarly, in the present case, the evidence adduced at trial showed that once the $5,000 stop-loss threshold was reached, Arc's carrier covered 100% of Erica's claims. Arc's officers testified that no one at Arc received a breakdown of claims per employee above the $5,000 level.

33. Finally, Arc points to various actions that it took to assist the Resners, including making an interest-free loan to finance the purchase of a specially-equipped van, taking steps to provide Erica Resner with a live-in aide, and voluntarily paying the plaintiffs' COBRA premiums for several months, as evidence of a sympathetic corporate attitude that belies any inference of discrimination. On balance, I find that plaintiffs have not satisfied even the minimal burden necessary to establish a prima facie case. Plaintiffs rely heavily on the eleventh hour testimony of Mr. Herzcfeld, which I found wholly non-credible, and on apparently neutral facts including the magnitude of Erica's medical expenses and Ms. Resner's generally satisfactory job performance. Nothing that plaintiffs established at trial persuaded me of the required specific

motivation: plaintiffs have not demonstrated, by direct or circumstantial evidence, that Arc was more likely motivated by the unlawful intent to prevent the Resners from exercising their benefits under the employee health plan than not.

34. Moreover, even if plaintiffs had established a prima facie case, Arc has articulated a legitimate, non-discriminatory reason for its conduct, which causes the presumption of discrimination to drop out of the case. See Fisher, 70 F.3d at 1433 (citing St. Mary's, 509 U.S. at 515-16). Arc anticipated a downturn in business in 1994, a prediction that proved accurate, and terminated three other employees at the same time as Ms. Resner. Given the size of Arc's nonunion employee pool, this represented a substantial reduction in force. I find Arc's decision to reduce its force by eliminating redundant or less critical positions to be a legitimate, nondiscriminatory reason underlying Ms. Resner's termination. See Testerman v. EDS Technical Prods. Corp., 98 F.3d 297, 303 (7th Cir. 1996) (upholding summary judgment for employer in ADEA action where employee was terminated as part of a reduction in force); see also Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 761 (5th Cir. 1996) (upholding grant of summary judgment in ERISA action where employer implemented a reduction in force and employee produced no evidence of specific intent to discriminate).

35. Plaintiffs misunderstand the applicable standard when they insist that defendant's proffered reason is unworthy of credence. They point, for example, to the relatively modest cost savings achieved by the terminations and to their perception that Ms. Resner's function was more important than the duties performed by the other terminated employees.

Section 510, however, "protects employees from conduct designed to deprive them of rights created under employee benefit plans; it does not cast liability on an employer for misjudgments respecting an employee's contribution to the company. Evidence that an employer made a poor business judgment in discharging an employee generally is insufficient to establish a genuine issue of fact as to the credibility of the employer's reasons." Dister, 859 F.2d at 1115. In short, "[a] business decision need not be good or even wise. It simply has to be nondiscriminatory . . . ." Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 20 (7th Cir. 1987).

36. Thus, the present case is not one in which the plaintiff's demonstration that the defendant's proffered reason is pretextual, coupled with the proof that comprises the prima facie case, is sufficient to carry the ultimate burden of proving unlawful discrimination by a preponderance of the evidence. Salpaugh v. Monroe Community Hosp., 4 F.3d 134, 142 (2d Cir. 1993), cert. denied, 510 U.S. 1189 (1994). Plaintiffs have not demonstrated either that defendant's decision to cut costs was a mere pretext or that the true motivation underlying defendant's actions was discrimination. St. Mary's, 509 U.S. at 519; Fisher v. Vassar College, 70 F.3d 1420, 1437-38 (2d Cir. 1995), aff'd on reh'g en banc, 1997 WL 310467 (2d Cir. 1997). Without any such evidence, a judgment for defendant is required.

37. Thus, even if plaintiffs had established a prima facie case, they have not come forward with any evidence to overcome the evidence presented by Arc that it had a legitimate, nondiscriminatory motive to discharge Ms. Resner. Ms. Resner may disagree with Arc·s conclusion that she was one of the four

most expendable employees in October, 1993 or that the anticipated decline in 1994 business warranted her termination. Her disagreement, however, does not prove that Arc's proffered reason is a mere pretext, still less that Arc's true reason was discrimination.

CONCLUSION

Plaintiffs have failed to demonstrate that Ms. Resner's termination took place under circumstances giving rise to an inference of unlawful discrimination. Even if the plaintiffs had made the showing necessary to establish a prima facie case, however, plaintiffs' trial evidence was wholly inadequate to overcome defendant's proof that it had a legitimate, nondiscriminatory reason for its actions. Accordingly, the action is dismissed, and judgment shall be entered in favor of defendant Arc. The Clerk of the Court shall mark this action "closed."

SO ORDERED:

Dated: New York, New York
July 16, 1997

/s/
LORETTA . PRESKA, U.S.D.J.

Supreme Court, U.S.
FILED
SEP 18 1998
OFFICE OF THE CLERK

No. 98-137

In The

Supreme Court of the United States

October Term, 1997

ERICA RESNER and MARY LOU RESNER,

Petitioners,

vs.

ARC MILLS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

There are no parent companies or nonwholly owned subsidiaries of Respondent Arc Mills Corp.

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STATEMENT OF THE CASE

In this case, the trial court made detailed findings of fact concluding that Petitioners failed to establish a *prima facie* case of discrimination under Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140 (1998), and that, in any event, Respondent Arc Mills Corp. ("Arc") had articulated a legitimate non-discriminatory reason for terminating the employment of Petitioner Mary Lou Resner ("Mary Lou"). The Second Circuit affirmed this holding under a clearly erroneous standard, stating that "the plaintiffs do not point to any evidence that was overlooked by the District Court, they merely argued that the District Court came to the wrong conclusion after reviewing the evidence." (A 7)[1]

Petitioners now seek certiorari claiming that the District Court overlooked a factual issue — despite the fact that the District Court made a specific finding on this exact point. Through blatant misstatements of fact, Petitioners again seek to reargue their factual assertions. For this reason, the Petition for Certiorari should not only be denied, but appropriate sanctions should be awarded.

A. The Trial

This action was commenced in the United States District Court for the Southern District of New York in April 1995. Petitioners alleged that Arc decided to terminate Mary Lou in October 1993 because of its alleged concerns about the possible increase in the cost of its company sponsored health insurance

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1. ("A") refers to the summary order of the Second Circuit which was annexed as Exhibit A to the petition for writ of certiorari; ("B") refers to the Findings of Fact and Conclusions of Law of the District Court, annexed as Exhibit B to the petition; and ("JA") refers to the joint appendix on appeal in the Second Circuit Court of Appeals.

policy as a result of an accident suffered by Mary Lou's daughter, Erica, eighteen months earlier, which rendered her a quadriplegic.

The evidence at trial established that Mary Lou's employment was terminated as part of a reduction in force that resulted in the simultaneous termination of three other employees. Mary Lou's position in the credit department has not been replaced, and the credit department has since further reduced its staff. Since October 1993, the position of only one of the four terminated employees has been replaced. (B 5)

The trial court found that the reason for the reduction in force was because Arc was concerned about the state of the textile industry and determined that the upcoming year would not be as successful as 1993. (B 3) The financial documents introduced into evidence demonstrated that Arc's predictions were accurate. (B 4) The trial court further accepted Arc's testimony that the reason it decided to terminate Mary Lou's employment was because she continually complained that she had too much work to do and needed assistance, while her co-employee in the credit department, Lazlo Herczfeld ("Herczfeld"), advised management that he had additional time to complete his work and could perform additional duties. (B 4) Mary Lou admitted that she had made these complaints to management. (JA 37, 39-41)

Although petitioners' instant petition for certiorari is premised upon the notion that the trial court never considered why Arc decided to terminate May Lou, rather than Herczfeld, the trial court expressly found that:

> Mr. Klein [Arc's vice president who was responsible for the terminations] determined that the Credit Department was overstaffed. He selected Mary Lou

> Resner as the "most expendable" employee in the Department, although he believed her work had been generally satisfactory, *because Ms. Resner continued to claim that she needed assistance in dealing with the growing volume of factored accounts, while Mr. Herczfeld assured him that he was eager to take on Ms. Resner's work in addition to its own.*

(B 4, emphasis added).

The trial court further concluded that Arc had demonstrated that Erica's health condition played no role in its decision. Indeed, as the trial court found, Arc actually requested that its health insurer, CHUBB Life America ("CHUBB"), cover the cost of live-in care for Erica on an "extra-contractual basis", Arc made an interest-free loan of $6,000 to Mary Lou in order for her to obtain a specially equipped van for Erica, and Arc voluntarily agreed to pay petitioners' health insurance payments from October 1, 1993 through December 31, 1993, and continued to make these payments through May 30, 1994, thereby creating an incentive for both Mary Lou and Erica to remain on Arc's health plan. (B 5-6) Further, after December 1994, when Arc was advised that Erica could not be covered under the health plan because she now qualified for Medicare benefits, Arc made efforts to seek continued coverage for petitioners under the Company's group plan. (B 6)

Contrary to Petitioners' premise of discrimination, Erica's medical condition did not cause Arc to incur any additional costs. As the trial court found, documents produced from both CHUBB and Aetna, Arc's health insurer beginning in January 1995, demonstrated that Erica's condition had no impact upon the premiums charged to Arc, because premiums were based upon a general community rating, rather than the claims

experience of the employees. (B 7) In addition, as the trial court found, the cost of dependent coverage was paid by employees, and was not paid by Arc, and any alleged increased premium as a result of Erica's medical condition would therefore not be borne by Arc. (B 7-8)

B. The Court's Decisions

After reviewing and marshalling the evidence, the trial court concluded that:

> [P]laintiffs have not satisfied even the minimal burden necessary to establish a *prima facie* case . . . Nothing that plaintiffs established at trial persuaded me of the required specific motivation: plaintiffs have not demonstrated, by direct or circumstantial evidence, that Arc was more likely motivated by the unlawful intent to prevent the Resners from exercising their benefits under the employee health plan than not.

(B 14-15)

The trial court further concluded that

> even if plaintiffs had established a *prima facie* case, they have not come forward with any evidence to overcome the evidence presented by Arc that it had a legitimate, nondiscriminatory motive to discharge Ms. Resner.

(B 16)

On August 12, 1997, Petitioners appealed the trial court's findings of fact to the Second Circuit Court of Appeals. On April 22, 1998, the Court of Appeals affirmed the trial court's

decision. The Second Circuit deferred to the district court's "credibility assessment" (A 7) and concluded that:

> In reviewing the record as a whole, we find that the district court's determination that plaintiffs had failed to meet their burden of proving that Arc Mills' termination of Mary Lou was the result of unlawful discrimination was not clearly erroneous.

(*Id.*)

C. The Misstatements of Fact

In support of their petition, Petitioners have mischaracterized and misstated the facts. As already shown, their "Question Presented" is based on a false premise since the trial court made a specific finding that Arc had decided to terminate Mary Lou, rather than Herzcfeld, due to her continued complaints that she needed further assistance.

The petition for certiorari is replete with other misstatements of fact. Petitioners claim that Erica's accident "caused respondent to incur increased medical insurance premiums for Arc's employees and their dependents." This statement is completely false, as the trial court found, based upon documents provided by CHUBB, Arc's medical insurer between 1992 and 1995, that proved that Erica's condition had no impact upon the premiums paid by Arc. (B 7)

Petitioners' claim that in 1993 "Arc made it a practice to shop for better rates and moved from carrier to carrier to carrier" is also false. As the trial court found, Arc did not in any way seek a new medical insurer during 1993. It was only in the Spring of 1994 that Arc first began to solicit bids from other insurers. (B 6)

Petitioners further claim that

> [a]fter Erica's accident, Arc against tried to switch carriers. Arc applied to a well-known low-cost carrier but their application was summarily rejected specifically due to Erica's condition. Mary Lou was then fired, purportedly for reasons of cost-cutting.

This supposed event never occurred. Arc did not try to switch carriers until the Spring of 1994, more than two years after Erica's accident, which occurred on April 11, 1992, and nine months after Mary Lou was terminated in October 1993. (B 6) In addition, when Arc obtained new insurance during 1994, both Mary Lou and Erica were beneficiaries of the Arc plan — they were part of the company roster submitted for coverage. (B 7)

Petitioners claim that Mary Lou "introduced the company to the benefits of assigning their receivables to factors and earned the company many millions as a result." This so-called fact was never raised at trial and in any event is wholly untrue. In addition, there was nothing in the record that indicated that Herczfeld "had no prior experience with factoring."

Petitioners assert that Arc "knew that firing Mary Lou would save $120,000.00 in the first year alone so she was fired." The factual record does not contain anything related to cost-savings of $120,000. As the trial court found, Erica's condition never affected the cost of Arc's health insurance.

In an attempt to support their new argument that Herczfeld should have been fired, Petitioners state that "[a]t the time that Mary Lou was fired, Herczfeld was suspected for petty thievery." While Mary Lou testified that she witnessed Herczfeld engage in petty thievery, she never informed Arc

management of this act. In fact, Arc only found out about this incident during Mary Lou's deposition.

Petitioners must not be allowed to creatively manufacture facts. The string of outright falsities occurs throughout Petitioners' writ and cannot be considered mere innocent misstatements of fact. It is not surprising that these factual assertions are not supported by any reference to the record.

REASONS FOR DENYING THE WRIT AND AWARDING SANCTIONS

Petitioners cite no split in legal authority, or other legal issue, as the foundation for their request for certiorari. The only question presented for review is whether this Court should entertain an appeal of a factual issue that supposedly was overlooked by the trial court.

In fact, Petitioners' "Question Presented" itself is based on a flagrantly false premise — *i.e.*, that the trial court failed to consider why Arc terminated Mary Lou rather than Herczfeld. As discussed above, Paragraph 10 of the Trial Court's Findings of Fact and Conclusions of Law expressly deals with this issue and provides that Arc decided to terminate Mary Lou, rather than Herczfeld, because Mary Lou continually requested more assistance in order to complete her work, whereas Herczfeld had requested more work. (B 4) Petitioners' contention that the trial court simply failed to consider this issue is therefore patently false.

Moreover, at trial, and in their appeal to the Second Circuit Court of Appeals, Petitioners did not argue that Mary Lou was somehow more qualified than Herczfeld nor did they dispute the fact that Mary Lou complained to management about completing her work. Indeed, Mary Lou admitted she made

such complaints. (JA 37-44) Rather, Petitioners argued that the termination of all four employees was a guise for eliminating Erica from Arc's medical plan. Petitioners should not now be allowed to set forth new arguments before this Court that were not put before the trial court or the Circuit Court of Appeals. *See Miree v. DeKalb County*, 433 U.S. 25, 33-34 (1977). ("The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it." (citing *Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958))); *Ellis v. Dixon*, 349 U.S. 458, 459 (1955), *reh'g denied*, 350 U.S. 855 (1955) ("The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here.").

Given that Petitioners' Question Presented is based on a false premise and the sheer number of untruths stated in the writ, as well as the fact that there is simply no basis for further review of the trial court's credibility and factual determinations, the Supreme Court should find that the instant Petition is frivolous and that Petitioners', and/or their counsel, should be sanctioned pursuant to United States Supreme Court Rule 42.2 which provides:

> When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

Sup. Ct. R. 42.2; *see, e.g.*, *Slaker v. O'Connor*, 278 U.S. 188, 190 (1929) ("[W]here a writ of error or appeal is dismissed

because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed."); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226 (1923); *Texas & P.R. Co. v. Prater*, 229 U.S. 177 (1913) (where appeal to Circuit Court of Appeals and Supreme Court involves factual issues and no question of law, damages may be awarded); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109 (1912) (award of damages because of "frivolous and unsubstantial nature" of question presented).

CONCLUSION

This Case does not merit further review by this Court. For the foregoing reasons, Mary Lou Resner and Erica Resner's Petition should be denied and Petitioners and/or their counsel should be appropriately sanctioned.

Dated: September 18, 1998

Respectfully submitted,

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REBUTTAL

The purpose of this Reply is to respond to allegations in respondent's brief that petitioners misstated facts, none of which are true.

It appears that once Arc resolved to fire Mary Lou they asked Herczfeld if he could handle the department. He gave the so-called "right" answer that he could. It turned out that he could not and was eventually fired. Mary Lou did continually voice the opinion that the department was understaffed and that assistance was necessary, partially due to the incompetence of Herczfeld.

The opinion of the district court plus testimony given at pre-trial depositions clearly indicate that Arc did, in fact, continually shop for less expensive medical insurance. (B 6) Arc went from Blue Cross to Chubb to Aetna within the span of about three years and made inquiries at Oxford only to be turned down specifically because of Erica. (B 6)

When Erica was injured Arc was covered by Chubb. Even after Mary Lou was fired they shopped for cheaper insurance and circulated a memo to their employees to this effect. Under the COBRA statutes Arc was required to keep Mary Lou and her dependents insured. During the period when Arc had to cover Mary Lou and her dependents, no carrier would take Arc's insurance though Chubb was legally obliged to keep them insured. Arc came up with the idea of trying to move the company to another carrier while leaving Mary Lou and Erica with Chubb, thereby living up to their legal obligations under COBRA. (B 6) They did not succeed. Eventually, though, social security took over coverage, Arc's COBRA obligations came to an end and Arc moved their insurance to another carrier, Aetna, at a savings of

about $90,000.00. This was testified to by Arc's's comptroller, Mr. Richard Kolson in his deposition dated October 12, 1995, page 161. Obviously, Arc did not change carriers for the fun of it but to save money. Add this $90,000.00 savings to the $30,000.00 saved by firing Mary Lou and it is obvious that Arc saved $120,000.00.

Furthermore, Mr. Kolson further testified that, as of the date of the deposition, Mary Lou's duties were being handled by Esther Monreau and Stu Frankel. (Kolson deposition dated 10/12/95, Page 76)

Petitioners are asserting no facts other than what came out at trial. Petitioners' grievance is that the trial court got so involved in finding that cost-cutting is a valid reason for firing someone that the obvious was overlooked, specifically that it made no sense to fire Mary Lou over Herczfeld unless consideration was given to Mary Lou's predicament and what it meant to Arc's bottom line.

Petitioners clearly made no misstatement.

CONCLUSION

For the reasons stated previously and herein, it is respectfully requested that this Honorable Court grant the petitioners' petition for a writ of certiorari.

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Respectfully submitted,

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